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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,

Petitioner,

—v.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF AMICUS CURIAE OF NANCY S. ERICKSON, THE NATIONAL CENTER ON WOMEN & FAMILY LAW, INC., AND THE COMMITTEE FOR MOTHER AND CHILD RIGHTS, ON BEHALF OF UNWED MOTHERS.

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Interest of Amici

Amicus Nancy S. Erickson is a Professor of Law at the Ohio State University College of Law, teaching family law, constitutional law, and sex discrimination. Her concern with this case is that the interests of unwed mothers are not being argued by any party to this action. She wishes to help the Court to avoid a holding or even dictum that might adversely affect the rights of unwed mothers in the cases that will surely arise hereafter.

The National Center on Women & Family Law, Inc. (NCOWFL) is a private, not-for-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance to poor women. A significant proportion of NCOWFL's constituency is comprised of unwed and single mothers. The issues raised by the instant case, including the constitutional right of privacy of the unwed mother and

her right to elect and secure adoption for her child, are of central concern to NCOWFL and its constituency.

The Committee for Mother and Child Rights is an organization of approximately 500 members in thirty states. One of its concerns is that courts and legislatures should recognize the maternal risks and burdens of pregnancy and childbirth in enacting and enforcing laws concerning the custody and welfare of children.

It is the view of Amici that unwed mothers are entitled to a voice in a case such as this that so vitally affects them. Traditionally, the unwed mother has been seen simply as a source for babies to be adopted and not as a human being with needs of her own. "Sympathy for the [unwed] mother was not altogether absent, but she was really not to be considered except to relieve her of an intolerable burden." C. PRENTICE, AN ADOPTED CHILD

LOOKS AT ADOPTION 92 (1940).

Because unwed mothers usually want to preserve their anonymity, there is no known public organization of unwed mothers that could submit an amicus brief in this case.*

Amici in this brief will present the views of unwed mothers who have chosen adoption. Amici have solicited letters from actual unwed mothers asking them to tell this Court, in their own words, why it was important to them to have the adoption alternative available and what effect it would have had on their decision-making processes if the father's consent had been necessary for the adoption. Portions of

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*There is an organization called The Concerned United Birth Parents, made up of parents who have given up their children for adoption, but the purpose of that group is to lobby for "open adoption records" laws; thus, that group would not be representative of the many unwed mothers who do want to retain their anonymity and should be represented in this case.

these letters are quoted in this brief.

Amici are also concerned that a decision by this Court requiring unwed mothers and unwed fathers to be treated exactly the same will result not in an increase of rights to the unwed father, but in a decrease of rights to the unwed mother. Specifically, the States could view a decision by this Court requiring exact equality between the sexes as permitting the termination of an unwed mother's rights to her child on a best interests standard. Because the mother has more of a substantive due process interest in raising the child than does the father, this result should not be permitted.

All parties have consented to the filing of this brief, and their consents have been filed with this Court.

SUMMARY OF ARGUMENT

Texas law provides that an unwed mother may surrender a child for adoption shortly after birth without the consent of a biological father who has not legitimated the child, although he must be given notice. A biological father who wishes to legitimate the child, thus obtaining the right to veto an adoption, may do so with the mother's consent. If she refuses to consent, her consent may be dispensed with if the court finds that to do so would be in the best interest of the child. Texas Fam. Code §13.21.

The Texas statutory scheme does not violate any substantive due process rights of Petitioner. If a man is involved in a sexual relationship with a woman for recreation, not procreation, but pregnancy accidently occurs, the State has not deprived him of any constitutional right to decide whether to "beget a child."

Eisenstadt v. Baird, 405 U.S. 438 - (1972). Birth control failure, not the State, has deprived him of that right. Thereafter, the right to decide whether to continue the pregnancy belongs to the woman alone. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

The due process privacy interest also encompasses a "freedom of personal choice in matters of family life." Santosky v. Kramer, 445 U.S. 745 (1982). However, the Texas statutory scheme does not violate any "family life" interest of Mr. Kirkpatrick's (hereinafter Mr. K.) because he was never part of Baby Girl S.'s family, in the sense of a person who lives or has lived with another person on a day-to-day basis. That was the definition of "family" in Santosky and other "family life" cases of this Court.

Here the existing "family" is the

family of mother and child. The mother did not, by marriage or otherwise agree to have a family relationship with Mr. K., and none can be forced upon her. Loving v. Virginia, 388 U.S. 1 (1967). Mr. K. claims he is entitled to establish such a family, but he is not. The State is not obligated to create a family that the biological parents have not created by themselves.

But even assuming that an unwed father solely by virtue of biological connection to a child has substantive due process privacy rights, they may be affected or even terminated by the State if the State demonstrates a compelling state interest for doing so and shows that the statutes are necessary to achieve that compelling state interest. Zablocki v. Redhail, 434 U.S. 374 (1978).

Here there are four compelling state interests underlying the Texas statutory

scheme. First, Texas' interest in the welfare of the child is furthered by encouraging the unwed mother to make plans for the child that are in the child's best interest. The Texas law ensures her that if she carries to term she will have full control over decisions concerning the child, unless those decisions are not in the best interest of the child. Relieving her of the fear that the biological father will overrule her plans is in the best interests of the child because maternal stress is harmful to the fetus (see citations infra).

The State's second compelling state interest is the interest in preserving the woman's right to choose whether or not to bear the child. Roe v. Wade, 410 U.S. 113 (1973). A woman must know, before she makes the abortion decision, that if she foregoes that constitutionally-protected right, and incurs the life and health

risks of pregnancy and childbirth, the State will assure her that her plans for the child's future will be followed, unless they are not in the child's best interests.

The third compelling state interest at stake is the interest in safeguarding the unwed mother's right to anonymity and right not to have a relationship with the child if she wishes to place it for adoption.

This Court has recognized as fundamental an interest in avoiding disclosure of personal matters. Whalen v. Roe, 429 U.S. 589 (1977). Even if the State is not constitutionally required to afford the unwed mother this protection, it may assert a compelling state interest in doing so by statute, especially where to fail to afford her this protection would be to encourage "black market" adoptions and to encourage some unwed

mothers to retain custody of the child where they are too young or in no position to do so, leading to high school drop-outs, loss of job or career prospects, and children growing up on public assistance.

Denial of the anonymity that adoption affords would be especially damaging to the mother in this case, because she must return to her parents' home in the small town where Mr. K. also lives, so that meetings with the child, even accidental, would be unavoidable.

The fourth compelling state interest served by the Texas statutory scheme is the interest in preventing the exploitation of women as unwilling breeders for males who desire children but have not found women who are able and willing to bear children for them. That such exploitation is a real possibility is evidenced by the growing practice of the hiring of surrogate mothers and by at least

one reported case. W.E.J. v. Superior Court, 160 Cal. Rptr. 862, 100 Cal. App. 3d 303 (Ct. of Appeal, 2d Dist. 1979).

The Texas statutory scheme is necessary to the achievement of these compelling state interests; there is no alternative scheme that would serve the state interests as well and would put less of a burden on whatever interests the unwed father might have.

In fact, a law giving him even fewer rights would be constitutional. For example, a law such as N.Y. Dom. Rel. L. 111-a(2)(c), which requires a potential father to sign a "putative fathers' registry" if he desires notice and a hearing to object to placement of the child for adoption would be constitutional even if it required such a filing within a short time after conception. A man knows with whom he has had sexual relations; if he wishes any rights with regard to the child, it is no

undue burden on him to require him to assert these rights before the time for the woman to obtain a safe abortion has passed.

If the Texas statutory scheme passes the compelling state interest test, it must, by definition, pass the equal protection test of Craig v Boren, 429 U.S. 190 (1976). Thus, there is no impermissible sex classification in the law. Additionally, Mr. K. is a strange advocate of men's equal rights to raise children when his trial testimony indicated that he intended to leave all childcare responsibilities to the women in his family -- mother, sister or grandmother.

Finally, the best interests standard is not constitutionally vague, especially as applied here. The best interests standard is used by judges in every jurisdiction every day in divorce custody cases and is used in many jurisdictions, not just Texas, for cases such as this.

Even if this Court finds constitutional violations, its decision should not be applied retroactively, to the date of this child's conception, by giving this father adoption veto rights. Finally, if he is to receive any more rights than the many substantive and procedural rights that Texas has already given him, the court on remand must give Ms. S. an opportunity to reassert her rights. In making its decision, the court on remand should also keep in mind that the best interests of the child, now over 2 years old, may lie with the couple she now lives with and views as her parents, even in the event that Mr. K. gets a veto over their adopting her.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT IN THIS CASE AS INPROVIDENTLY GRANTED, BECAUSE THE VIEWPOINT OF UNWED MOTHERS IS UNREPRESENTED HEREIN, AND THAT VIEWPOINT IS INDISPENSABLE TO A PROPER CONSIDERATION OF THE ISSUES. IF THIS COURT DOES NOT DISMISS THE WRIT, IT SHOULD APPOINT AN ATTORNEY AD LITEM TO REPRESENT THE INTERESTS OF UNWED MOTHERS.

The unwed mother in this case, Ms. S., was represented by a guardian ad litem at the original hearing. Neither that attorney nor any other attorney on her behalf has participated in any steps of the appeal process. Because of the nature of this case, that is not surprising. The mother, believing that adoption was in the best interests of the child and also desiring the anonymity that adoption could afford to her, is unlikely to want to continue to be involved in this action. Nor do we think that she should be asked to become involved. However, as a class,

unwed mothers who desire to give up their children for adoption should be represented in this action, for their viewpoints are indispensable to a proper consideration of the issues.

Several states give to unwed fathers who have established their biological paternity or whose paternity is not disputed the right to veto an adoption. However, no studies exist of the effects on the unwed mother and the adoption process of the father's veto rights. Indeed, many of these statutes were enacted in reaction to Stanley v. Illinois, 405 U.S. 645 (1972), so at most ten years have elapsed since their enactment. That ten years of experience has not been documented to an extent that would make it possible for Amici to provide statistics on the effects of paternal vetoes. Thus, we urge this Court to dismiss the writ in this case and to avoid

any broad holdings regarding unwed fathers' vetoes of adoptions for a reasonable time until such studies can be compiled.

With regard to time, it also should be noted that Caban v.Mohammed, 441 U.S. 380 (1979) was decided only four years ago, so that many adoption agencies and individuals who had believed that Stanley was a case involving procedural rights only have had a mere four years to revamp their laws in light of Caban.

If this Court does not dismiss the writ in this case, it should appoint an attorney ad litem to represent the interests of unwed mothers. An attorney ad litem appointed by this Court would have the financial resources and time to more fully document the issues discussed herein.

II. THE TEXAS STATUTORY SCHEME CHALLENGED HERE DOES NOT VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE UNWED FATHER BECAUSE IT IS NECESSARY TO THE ACHIEVEMENT OF COMPELLING STATE INTERESTS.

A. Unwed Fathers' Substantive Due Process Rights Regarding an At - Birth Adoption.

The right to privacy includes the right to decide, without undue governmental interference, "whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438 (1972). In this case, the state has not interfered with Mr. K.'s decision to beget a child. In fact, Mr. K. never decided to be a parent. This child was conceived against the wishes of the unwed individuals, by accident. Mr. K. had no expectation of enjoying parental rights. His only expectation was enjoyment of a sexual relationship.* Thus, the Texas statutes do not interfere

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*Ms. S. had the same expectation originally; however, pregnancy altered that expectation. Thereafter, she had to take on parental duties unless she decided to abort. Along with those parental duties she would get parental rights.

with any constitutionally protected decision to beget a child.

This Court has also spoken of the right to privacy as encompassing "freedom of personal choice in matters of family life." Santosky v. Kramer, 445 U.S. 745, 753 (1982), citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978), Smith v. Organization of Foster Families, 431 U.S. 816,845 (1977), Moore v. City of East Cleveland, 431 U.S. 494 (1972)., Cleveland Board of Education v.La Fleur, 414 U.S. 632 (1978), Stanley v. Illinois, 405 U.S. 645 (1972), Prince v. Massachusetts, 321 U.S. 158 (1944), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska 262 U.S. 390 (1923).

Those cases have indicated that the interest of natural parents in the care, custody, and management of their child is a fundamental liberty interest. Mr. K. argues that this liberty interest applies

to all "natural parents" by virtue of their biological relationship to the child.

Even if that is so, this Court has never declared that right to be absolute. The state may impinge on a fundamental right if there is a compelling state interest for doing so and no less burdensome alternative is available. Zablocki v. Redhail, 434 US.374 (1978). We have delineated below (II B and II C) these compelling interests here and the lack of less burdensome alternatives.

Petitioner takes his argument one step farther, however. He quotes the following language of this Court:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt the breakup of a normal family over the objection of the parents and their child, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest." Quilloin v. Walcott, 434 U.S. 246,255 (1978).

Mr. K. claims that this language is applicable to the facts of his case. It is not. This Court held that language inapplicable to the facts of Quilloin. That language is also inapplicable to Mr. K.

Here the natural family is mother and child. The unwed biological parents have not agreed to marry, so if the mother kept the child, Mr. K. would never become part of the child's family. He has a biological connection to the child that may deserve recognition of some sort, and he might eventually develop a relationship to the child if the court permitted visitation, but he would never become part of the child's family in the sense of a person who lives or has lived with another person on a day-to-day basis.

It is that definition of family, we

believe, that this Court had in mind in Quilloin and Stanley v. Illinois, supra. Peter Stanley had lived with his children and their mother for many years as a family.

Mr. K claims that he wants the opportunity to establish such a family. However, the State is under no obligation to create a family that the biological parents have not created for themselves. They neither married nor lived together as a de facto family unit like Joan and Peter Stanley.

B. The Texas Laws Serve Compelling State Interests.

The Texas Statutory Scheme permits the mother to place the child for adoption over the objection of the biological father unless legitimation by the father is found to be in the child's best interests. This statutory scheme serves at least four compelling state interests.

First, the state has a compelling interest in promoting the best interests of the child. The Texas statutes ensure an unmarried, pregnant woman that if she carries the pregnancy to term she will have full control over decisions concerning the child unless such decisions are not in the child's best interests. As the Texas Court of Civil Appeals stated in this case:

> [T]he State has a legitimate interest in protecting the children who are born as a result of pre-marital sexual activity. The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical burdens and responsibilities of the pregnancy. She can choose to abort the child or she may carry it full term. The state has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. In re Baby Girl S., 628 S.W. 2d 261, 264 (Tex Ct. of

Cir. App. 1982), quoting from In the Interest of T.E.T., 603 S.W. 2d 793, cert. denied sub nom. Oldag v. Catholic Charities, 450 U.S. 1025 (1980).

No study has ever been made of what effect a paternal adoption veto would have on the unwed mother (see Part I, supra). Ms. S testified that in such an event, she would have to reconsider her surrender of the child (J.A. 343a) because the child would be better off with her than with Mr. K (J.A. 186a). We urge this Court to listen to the voices of other actual unwed mothers faced with such a veto power or considering what effect such a veto power would have had on their decisionmaking.

D. H.* writes from a state that requires the biological father's consent:

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* Initials (not the real initials) are used to protect the mothers' anonymity. Signed originals are on file with Amicus Erickson, who assured anonymity to these unwed mothers.

I was married to the father of my first child, but he left us a few months after she was born. At the time of our divorce he was ordered by the judge to pay $100.00 a month in child support. To this date, I have received $60.00 total for the four years. . . . He has also refused to relinquish his parental right. . .

I do not have at the present time a home, a car, or a job. Therefore, I am unable to provide even the basics of life. Motherhood has been a constant struggle for me. I do not want to bring another child into this type of "hand to mouth" existance. If the father will not give his consent, I will be <u>forced</u> to keep this child despite my feelings that it would be in the child's best interest to be adopted.

In my opinion, for our situation, adoption would be the "ultimate love." I think I deserve the opportunity to make this decision of love for my child.

S. S. states:

Should the father have contested my decision to place the baby for adoption, and should he have had the legal right to do so, I believe my ultimate decision could have been drastically different. As little as he was involved in the pregnancy, I

> believe I can question what his commitment as a father would have been. Although it's hard to predict how I'd have reacted if he had threatened the adoption, I believe I would have fought for custody myself to raise the baby.
>
> The possibilities of that father's right raises fear in me now. It concerns me so, because, in my case, I was not ready then to be a mother, much less a single mother. I might later have resented my child, who would certainly not have been at fault, for causing me to drop out of college, etc. And, most importantly, my child might not have been raised in a secure family environment of acceptance and love that every child needs and deserves.

As these letters illustrate, the decision to permit adoption is often the most mature* decision and the one conduc-

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* Several studies have shown that unwed mothers who choose adoption rank as relatively more mature on scales of psychological adjustment. See, e.g., Blum & Resnick, Adolescent Sexual Decision - Making: Contraception, Pregnancy, Abortion, Motherhood, 11(10) PEDIATRIC ANNALS 797 (1982); Grow, Today's Unmarried Mothers: The Choices Have Changed, 58 CHILD WELFARE 363 (1979). Thus, birth mothers who choose adoption cannot be stereotyped as selfish and immature individuals who

ive to the best interests of the child.

To allow the pregnant woman to make the choice she believes is in the child's best interests also serves those interests by allowing her to have peace of mind thereafter during her pregnancy. It has been medically documented that stress suffered by a pregnant woman may have serious detrimental effects on the fetus.**

The State has a second compelling state interest here, the interest in preserving the woman's fundamental right

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(* con't. pg. 25) want to quickly rid themselves of undesired responsibilities by handing over their children to others. Rather, it appears that in most cases they agonize over the decision and try to make it in the child's best interests. The State has a compelling interest in encouraging them to do so.

**See, e.g., Gorsuch & Key, Abnormalities of Pregnancy as a Function of Anxiety and Life Stress, 36 PSYCHOSOM. MED. 352 (1974); Picone et. al., Pregnancy Outcome in North American Women II: Effects of Diet, Cigarette Smoking, Stress, and Weight Gain on Placenta, and on Neonatal Physical and behavioral Characteristics, 36 AM. J. CLIN. NUTR. 1214 (1982).

to choose whether or not to bear a child. In re Baby Girl S., supra, 628 S.W. 2d at 264.

This Court stated in Roe v. Wade, 410 U.S. 113, 153 (1973), that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." If the woman has this decision-making right, then the State must have the power to preserve the purity of her decision-making process and the power to prevent her from being coerced in one direction or the other, especially for the private interests of one individual.

In the context of the facts of cases such as this, the State may assert an interest in making sure that the woman is not pressured into having an abortion against her own true wishes, out of fear of losing the child to the potential father in a custody battle (if she wants

custody) or fear that her adoption plans for the child will be thwarted by him. S. J., now residing in an unwed mother's home in Texas, writes:

> [A]lthough the choice would have been extremely difficult, I would have had to consider abortion. I don't think I could go through a full-term pregnancy on my own, knowing I never could provide [via adoption] the kind of life I want for [the child].

Not even a pregnant woman's husband may demand that a fetus be either aborted or carried to term over the objection of the pregnant woman herself. Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Because that is so, it must be the case that an unwed potential father also lacks any such right.

The pregnant woman needs to be able to know, when she makes the decision whether or not to abort, that if she foregoes that constitutionally-protected right, the State will assure her that her

plans for the child's future will be followed, unless they are not in the best interests of the child. That is precisely what the Texas law does.

The third compelling state interest at stake here is the interest in safeguarding the unwed mother's fundamental right to anonymity and right not to have a relationship with the child if she decides to give it up for adoption.

In Whalen v. Roe, 429 U.S. 589, 599-600 (1977), the Court stated:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

For brevity, we will call these the "non-disclosure interest" and the "liberty" interest, respectively.

The liberty interest has been deemed

the source of a birth mother's right to anonymity in at least two cases. In Margaret S. v. Edwards, 488 F. Supp. 181, 189, n. 16 (E.D. La. 1980) (dictum), the court identified the right of privacy of the birth mother who has given up a child for adoption as a fundamental liberty interest, citing Massey v. Parker, 362 So. 2d 1195, 1199 (La. App. 4th Cir. 1978) writ granted, 363 So. 2d 1385 (La. 1978)(Schott, J., dissenting). The liberty interest could be deemed the source of this right because if a woman has a right to choose to abort, her decision to bear the child and give it up for adoption should be given the same level of protection. Further, the choice to place the child for adoption, a choice no one except a parent may make, is an exercise of the parental right to control the care, custody, and upbringing of the child. See Pierce, Meyer, and Stanley v.

Illinois, supra. In a marital setting, or in a setting such as in Stanley v. Illinois, supra, or Caban v. Mohammed, 441 U.S. 380 (1979), where the parents have lived together and raised their children together, both parents have that custodial right. In other contexts the unwed mother alone has that custodial right.* She is the "primary caretaker parent."**

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*See Texas Fam. Code §12.01, 12.04, 15.03, 16.03(d). A similar custodial right is the right to name the child. Traditionally, unwed mothers have the exclusive right to name their children based on having the care, custody, and control of the children as legal parents. This is still the law in most jurisdictions, and custodial mothers of marital children are now seeking the same right. In re Marriage of Schiffman, 28 Cal. 3d 640, 169 Cal. Rptr. 98, 620 P.2d 579 (1980) (Mosk J., concurring). Statutory provisions giving unwed fathers superior naming rights to mothers have been invalidated as unconstitutional. Roe v. Conn., 47 F. Supp. 769 (M.D. Ala. 1976); Jones v. McDowell, 281 S.E. 2d 192 (N.C. App. 769 M.D. Ala 1976). See generally MacDougall, Women's Names and the Naming of Children: Recognition of Women's Rights, ____ WOMEN'S RTS L. RPTR. __ (1973).

**Garska v. McCoy, 278 S.E. 2d 357 (W. Va. 1981).

The non-disclosure interest has been found by other courts to be the source of the birth parent's anonymity right.

This Court first discussed the non-disclosure privacy interest in Whalen, supra, citing Stanley v. Georgia, 394 U.S. 557 (1969) and Olmstead v. United States, 277 U.S. 438 (1928). This Court reaffirmed the existence of that interest in informational privacy in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), stating that individual interest in avoiding disclosure of personal matters" is an element of the right of privacy. Id. at 457.

The Second Circuit found such a non-disclosure privacy interest in Alma Society v. Mellon, 601 F.2d 1225 (2d Cir. 1979), where it upheld the validity of a New York statute requiring the sealing of adoption records.

Even if the right of non-disclosure

in the adoption context were not a fundamental right, a state would have a compelling interest in protecting that right if it chose to do so. In Catholic Charities of the Archdiocese of Dubuque v. Zalesky, 232 N.W. 2d 539 (1975), the Iowa Supreme Court recognized just such a state interest in protecting the confidentiality of adoption proceedings and the privacy of unwed mothers. Id. at 548-549. See also In the Matter of Linda F., 52 N.Y.2d 236, 239 (1981) (natural parents retain a potentially strong interest in maintaining their anonymity); In the Matter of the Adoption of E.W.C., 89 Misc. 2d 64, 67 (Surrogate Court, Nassau Co. 1976) (unwed mothers' threatened privacy may lead to socially undesirable routes to the placing of children); and Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. 302 (1977) (confidentiality of sealed adoption records).

Letters to Amici from several birth mothers indicate the importance to them of the confidentiality that adoption affords. R. T. writes:

> The reason why it is important to have the alternative of adoption available to me is because at a young age I will need time to live my life the right way and not the wrong way . . . [C]onfidentiality is important to me because I really think this [pregnancy] is a mistake and not something I want eveyone knowing because I have a life to live and need all the time to get over this and I don't want all my friends to know . . . ."

Indeed, confidentiality is often a most critical factor for a pregnant woman in deciding whether to proceed with an adoption through legal channels rather than pursuing some other course, legal or illegal, which she would not consider in her own best interest or in the best interest of the child. If this Court declares a paternal adoption veto to exist, it must be expected that women in the future will be discouraged and fearful

of placing their children for adoption. Indeed the inescapable lesson will be that unless a woman can successfully conceal the father's identity*, she can only protect the privacy and anonymity of her circumstances by choosing abortion, even if she wishes to carry the fetus to term, or blackmarket adoption or, indeed, retention of the child herself when she knows that would not be in the best interest of the child. The problems caused to the State when young girls keep their children when unprepared to do so are manifold: the girls often drop out of school, their job prospects are forever ruined or diminished, and their children grow up on public assisance.

The fourth compelling state interest served by the Texas statutory scheme is

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* C.K. writes: [If the father could veto adoption] I [and others] would lie like crazy . . .[although the bad result would be that] these babies' biological backgrounds would be hazy messes."

the interest in preventing the exploitation of women as unwilling breeders of babies for males who desire children but have not found women who are able and willing to bear children for them.

At least one reported case shows that this is a realistic concern. W.E.J. v. Superior Court, 160 Cal. Rptr. 862, 100 Cal. App. 2d 303 (Court of Appeal, 2d Dist. 1979).* In W.E.J., the unwed mother, Ms. G., released her baby for adoption. The biological father, Mr. L., appeared at the adoption hearing. He testified that he was, at the time of the conception and at the time of the hearing, married to a woman other than Ms. G., and that his wife was unable to bear

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* Amicus Erickson also knows of a similar unreported case in Cleveland in which a married man sought visitation rights with regard to his child who was born to a married woman (not his wife) whom he had impregnated.

children. He also testified that at the time the child was conceived, Ms. G. agreed that Mr. and Mrs. L. would raise the child; in return Mr. L. agreed to support her during the pregnancy and postpartum period. He testified that he lived up to his part of the bargain but she did not. The trial court granted him custody on a mistaken view that California law* required it because he was without question the biological parent.

The appeals court held the alleged agreement immaterial, stating that an agreement between parents respecting custody does not limit the power of the court. Because Mr. L. was not a "presumed father" under California law, the court further held he was not entitled to veto the adoption and not entitled to custody, although the court on remand would have to

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*Cal. Civ. Code §7004.

consider whether custody to him would be in the best interests of the child.

In the course of its opinion, the W.E.J. court quoted the warning of a noted legal scholar:

> The extreme view that all unmarried fathers are to be accorded equal custody rights with the mother (and on a par with married fathers) would have disastrous consequences for the child. Every unmarried father would then have the power to block an adoption by withholding consent, and would be in a position to remove the child from the mother. It is one thing to recognize the father's custodial rights when father and mother are living together as a de facto family, or when the children live with the father. California law accords the father custody rights under such circumstances. It is quite another matter to extend equality of custody to the father who is a stranger to the child. [Fn. omitted.] Bodenheimer, New Trends and Requirements in Adoption Law and Proposals for Legislative Change, 49 S. CAL. L. REV. 10, 57-58 (1975).

The law review article's concerns about "disastrous consequences for the

child" are well founded. There could also be disastrous consequences for the mother.

In the W.E.J. case the biological father claimed there had been an agreement between him and the mother but the actual facts underlying W.E.J. could just as easily be either of the following: (1) knowing of his wife's inability to have children, Mr. L. could have had a sexual relationship with Ms. G. for the purpose (not revealed to her) of later claiming the child, thus obtaining the benefits of a surrogate mother with little expense, or (2) desiring simply to have an extra-marital affair with Ms. G., Mr. L. could have accidently caused the pregnancy; then when the pregnancy became known, he could have determined to take advantage of the situation to get the child for his childless marriage.

Each of these two scenarios would cause the same amount of oppression to the

unwed mother in that in each case she would be the one who would suffer severe detriments from the pregnancy and childbirth while the person who suffered not at all would reap the benefit of a newborn child for his childless home (if, upon birth, it was a healthy, appealing baby; if not, he could simply make no claims to it and the mother again would be burdened with planning its future).

In Roe v. Wade, supra, this Court enumerated the detriments that may flow from childbearing, including physical and mental health damages. Id. at 113. Those detriments still occur today.

In this age of advanced medical technology, we tend to block out the fact that pregnancy and childbirth are still physically hazardous and sometimes fatal for women. This Court will recall that Weinberger v. Wiesenfeld, 420 U.S. 636

(1975) involved a father whose wife died in childbirth. In terms of the case at bar, the childbearing mortality of women of Ms. S.'s age at birth of the child is many times greater than the mortality rate for first trimester abortion. LeBolt et al., Mortality from Abortion and Childbirth: Are the Populations Comparable? 248 JAMA 188, 189 (1982). Thus, a woman who forgoes her right to abort increases her risk of death drastically.

Serious complications of pregnancy also continue to be more common than we would hope. WILLIAMS OBSTETRICS, 16th ed., at 535, 594, 908, 683, 665, 487, 859-75, 701-74 (1982). Then there are what physicians call the "common" or "minor" complaints of pregnancy, which would not seem minor to persons undergoing them. Id. at 322-23.

For a woman whose religious or moral

beliefs preclude abortion, and for women who do not realize they are pregnant or who deny it until the pregnancy is quite advanced, pregnancy and childbirth are physically dangerous and emotionally wrenching experiences. To add to this the stress and pain of knowing that the biological father has a right to the child even when the mother and a court would both agree that the child's best interests lie elsewhere would put an unconscionable burden on the pregnant woman.

As E. M. states:

> I am the person who is carrying this child. Not he. I am the person whose mental and physical health take risks. Not his. [sic]

All of the physical and psychological stresses that accompany pregnancy and childbirth are bad enough when the unwanted pregnancy is a result of an accident. How much more oppressive it would be if caused by the premeditated <u>plans</u> of a man bent on using the woman -

or girl - as a surrogate mother without her consent.

This Court should not countenance a rule giving a biological father the right to veto an adoption of a child that would be in the child's best interest, especially when such a right could be used for (and probably would encourage) the oppression of women, especially young, naive, and inexperienced ones such as Ms. S.

C. There are no less intrusive alternatives to the current Texas statutory scheme; in fact, Texas gives unwed fathers far more rights than the Constitution requires

Even assuming that Mr. K. has a substantive due process interest in a child who is connected to him by biology alone, this interest may be overcome by a showing that a statute impinging on that right is necessary to the achievement of the compelling State interests above.

A statute is "necessary" to achievement of a compelling state interest if no less intrusive means are available.

Here, no less intrusive alternative to the Texas statutory scheme is available to cover cases such as the one at bar.* Petitioner has suggested none.

Petitioner urges a requirement that the biological father be proven unfit before disallowing legitimation. An unfitness standard would not achieve the State's compelling state interests. It would not serve the State's interest in protecting freedom of choice because a hearing on unfitness could not be conducted within the time constraints for a safe abortion. An unfitness standard would

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* The Texas Law may have constitutional defects as to fathers such as Peter Stanley and Abdiel Caban, with whom the mothers of the children at issue had entered into family relationships, but Mr. K. is not similarly situated to them and so may not complain of this. See Broaderick v. Oklahoma, 413 U.S. 601, 610 (1973)

also not serve the State's interest in preventing the exploitation of women as unwilling breeders of babies for men. In most cases, such a hidden motive for causing pregnancy would be impossible for a court to ferret out so as to label the man unfit.

In fact, the Texas law gives the unwed father more rights than he is constitutionally entitled to receive. For example, there is no reason why Texas could not require an unwed potential father to file a notice of intent to legitimate the child within, let us say, five days from the time when he knows or should know of a possible pregnancy, even if the pregnant woman never informs him of the pregnancy, or be forever barred from asserting any rights to any resulting child.

The State could constitutionally pass such a law for the following reasons. It

is more than reasonable to assume that unwed males are having sexual relationships for recreation, not procreation. Those who do not intend to procreate should not receive any rights. An unwed male who is having sex for procreation can be assumed to know the name and address of the woman he is attempting to procreate with and the dates on which they had sexual relations. If he is sincere about wanting to procreate, he can simply file a notice of intent to legitimate the child within five days of every sexual act. If he does not, it is no one's fault but his own if he is given no rights to the child who may result from that act.

There is no state now with a law such

as the hypothetical law just described,* but if such a law were passed, there is no reason why this Court should not uphold it.

It would not violate the potential unwed father's substantive due process rights because the state has a compelling state interest in protecting a woman's right to choose to abort or bear the child and she needs to know of any potential claims to the child before the time to safely abort passes.

Our hypothetical law also would not violate his procedural due process rights. In essence, it is a type of

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* There are state laws with some similarities, however. The New York statute (N.Y. Dom Rel. L. §111 - a(2)(c)) currently under consideration by this Court in Lehr v. Robertson, No. 81-1756, requiring a potential father to sign a "putative fathers' registry" is far more generous to the unwed father than the hypothetical statute. Thus, there is no reason why the New York statute should not be upheld.

notice of claim requirement * with a short statute of limitations. Since he knows that a child might result from any act of intercourse, and since a short statute of limitations is necessary to achieve the State's compelling state interests, there would be no procedural due process violations. The fact that the law does not require the pregnant woman to notify him of the pregnancy is irrelevant. There is no reason why he should receive notice - he has notice of a potential pregnancy by reason of the sexual act.

The Texas law gives an unwed father-to-be many more rights than our hypothetical statute. Texas law provides no means by which the pregnant woman can unilaterally cut off all of his rights to notice and a hearing on the best interests of the child before the birth of the

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* Cf. N. Y. Gen. Municipal L. §50-e (notice of claim must be served on defendant within 90 days of tort).

child. He does not need to put in a notice of claim within a short period of time after intercourse or, indeed, at any time before receipt of notice that the mother intends to place the child for adoption. Like the statute upheld in Quilloin, supra, which contains a "best interests" standard, the Texas statute permits a legitimation action long after the child's birth. Finally, the Texas law also affords an unwed father a best interests hearing after the birth under all circumstances, when it would be constitutional to afford him no hearing of any sort unless he requested one early on in the pregnancy.

Because the Texas law affords the unwed father far more than that to which he is constitutionally entitled, it must be upheld.

III. THE TEXAS STATUTORY SCHEME DOES NOT VIOLATE EQUAL PROTECTION; IT IS NECESSARY TO THE ACHIEVEMENT OF COMPELLING STATE INTERESTS AND DOES NOT CARRY THE "BAGGAGE OF SEXUAL STEREOTYPES."

Mr. K. has argued that the Texas statutory scheme incorporates an impermissible gender bias. This argument has no merit. The proponent of a facially sex-based statute must bear the burden of demonstrating that the statute is substantially related to an important governmental objective. Mississippi University for Women v. Hogan, 73 L. Ed. 2d 1090, 1098 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

Here the State of Texas has met that burden. As we have demonstrated above, the Texas statutory scheme is necessary to the achievement of compelling state interests. If it passes the higher "strict scrutiny" test, it automatically passes the Craig intermediate level of scrutiny.

The Texas Statutory Scheme contains no sexual stereotypes that portray men as incapable of good parenting. There is no evidence that men are inherently less capable than women of raising children.* Petitioner does not need myriad citations (Pet. Br. at 71-72) to prove that point. Texas nowhere denies it.

Furthermore, factually this is an anomalous case in which to make such a claim. When asked about care for the child, Mr. K. always referred to his mother, who would have to quit her job to do so (J.A. 202a; 213a; 264a), his sister (J.A. 202a), or his grandmother (J.A. 209-210a). It never seemed to occur to him that he -- not the women in his family -- would be ultimately responsible for the child's care. It never seemed to occur to

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*With the exception of breastfeeding

him that perhaps a time might come when all of the women in his family might be engaged in other pursuits and he might have to hire a babysitter or quit his own job to take care of the child. His sole testimony on the issue of his own care of the child was as follows:

Q. Will you take care of the child at night?

A. Yes.

Q. You understand that taking care of a child is a lot of work?

A. Yes, I do.

Such perfunctory answers, together with the rest of his testimony, hardly indicate that he put much thought into the question of his own care of the child.

Even his own mother never testified that, on his own, Mr. K. would be capable of caring for the child. (J.A. 253a).

Amici do not argue that just because an unwed father's childcare plans include relatives, the plans are inadequate. It

is admirable and healthy for relatives to assist each other. On the Record in this case, however, a judge would be compelled to conclude that Mr. K. was planning to take virtually no personal responsibility for the care of his child, and that an award of custody to him would really be an award of custody to his mother or sister, who have no legally enforceable right to such custody.

Via Petitioner's brief (at 17, note 1) we are now informed that Mr. K. has married, that his wife is expecting a child in July, and that "Mrs. Kirkpatrick is a full-time homemaker and joins in her husband's desire to raise the daughter." Id. Yet another woman appears to take over the childcare responsibilities.

Petitioner seems to be arguing that awarding custody to fathers will contribute to the breakdown of sex-role stereotyping. However, that will be true

only if the father truly performs the primary nurturing function. If his mother, sister, grandmother, or new wife peforms that function, traditional sex roles will remain intact.

IV. THE BEST INTERESTS OF THE CHILD TEST IS NOT NEATLY MATHEMATICAL, BUT AN UNFITNESS STANDARD WOULD NOT SERVE THE COMPELLING STATE INTERESTS INVOLVED HERE.

The best interests of the child test is not perfect. It is not a mathematical formula that can be applied to reach a sure result. However, that test is the test used daily by judges all over the country to determine custody matters between divorcing parents. Many states, like Texas, use it in a context such as this.* For the reasons explained above,

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* Amici suggest that Petitioner's Statutory Appendix be ignored by this Court. Amici do not interpret many of the statutes listed there in the same way as Petitioner. For example, Petitioner states in his Appendix that "forty-one

(IIC) an unfitness standard would not serve the compelling state interests involved here.

(* con't. page 54) jurisdictions apply the same standard as they do to other parents, where the unwed father demonstrates the degree of interest and support petitioner Kirkpatrick has in this case." (Pet. Br. a-7) This implies that Mr. K. would win legitimation of Baby Girl S. in those 41 jurisdictions, except the six of those using a best interests standard for both parents, leaving 35 jurisdictions. But Petitioner is wrong as to some of those 35 and in others the precise situation is unclear. For example, Petitioner is wrong about Alaska. See Alaska Stat. 25.23.180(c)(2)(1982). The situation in California is unclear, but most likely Mr. K. would not be able to legitimate Baby Girl S there under these circumstances. See W.E.J. v. Superior Court, discussed in Section II B above. The situation in Michigan is also unclear because Ms. S. would have had the right to cut off his rights by serving him with a notice before the birth. MICH. COMP. L. §710.34 (1982-83 Supp.) The recently enacted (eff. June 29, 1982) Ohio law is also unclear. Compare Ohio Rev. Code §2105.18 (best interests test) with §3111.01 et. seq. (best interests test implied but not stated). Amici do not have funds and employees to check every statute in Petitioner's Appendix but with this many errors already noted, Amici suggest that this Court cannot rely on Petitioner's Appendix.

Finally, it should be noted that this is not a case in which the possibility of adoption is at all doubtful and in which failure to legitimate the child would result in the child's being placed in foster care. It is true, as Petitioner alleges, that the trial judge did not have before him the specific adoptive parents, in order to put them on the stand.This would destroy the anonymity of the adoption process. But the judge had testimony from the unwed mother both that she did not think Mr. K. would be as good a parent as she herself (J.A. 186a) and also that her wishes were to place the child for adoption. As not only the child's genetic parent, but also the person who went through the pregnancy and childbirth and was the child's guardian, the mother has a substantive due process right to have her wishes considered.

Additionally, the Christian Homes of

Abilene, Inc., is a licensed child-placement agency, held by the State of Texas to high standards of investigation of prospective adoptive parents. Those parents will not be perfect, but they will be as well-screened as possible in this imperfect world.

V. IF THIS COURT FINDS ANY CONSTITUTIONAL DEFECTS IN THE TEXAS STATUTORY SCHEME CHALLENGED HERE, ITS RULING SHOULD NOT APPLY TO THIS CASE BUT SHOULD APPLY PROSPECTIVELY ONLY AS TO OUT-OF-WEDLOCK CHILDREN CONCEIVED HEREAFTER.

At the time of her sexual relationship, all throughout her pregnancy, and even for a time thereafter, Ms. S. believed that the law guaranteed her the right and the duty of deciding what was in her child's best interest, without a veto from Mr. K. She made many decisions, large and small, in reliance on that belief. The same is true for all other

Texas unwed mothers whose pregnancies are now proceeding or whose children have been born and placed for adoption.

There is no longer an opportunity for them to abort in order to avoid the unwed father's control over their decision-making. For those like Ms. S. whose children have been placed, psychological damage to the children may result from removal from the adoptive home. For others still pregnant, a decision for adoption, which had put their minds at rest about the children's well-being, would be shattered and new decisions would have to be made.

The only way to protect valid expectation interests would be for this Court to apply this rule to conceptions that occur hereafter.

VI. UNLESS THE COURT AFFIRMS THE DECISION OF THE COURT BELOW, REMAND IS NECESSARY TO ALLOW MS. S. A CHANCE TO RECONSIDER HER SURRENDER OF BABY GIRL S. AND TO DETERMINE THE FATE OF THE CHILD.

At the trial of this case, Ms. S. testified that, as between her and Mr. K., she would be the better parent and that if adoption was impossible, she would have to reconsider her surrender of the child and retain custody herself. (J.A. 186a; see also J.A. 377a). She may continue to feel that way and she may not, but she must, if this Court does not affirm the holding below, have an opportunity to choose.

If Ms. S. chooses not to withdraw her surrender of the child, the court on remand will have to consider the question of possible remedies for any consititutional violations this Court may have found. Custody to Mr. K. cannot be automatic, for it might not be in the best interests of the child.

As this Court stated when remanding

Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972), in light of Stanley v. Illinois, supra:

> [T]he judgment vacated and case remanded . . . for further consideration in light of Stanley . . . with due consideration for . . . the fact that the child has apparently lived with the adoptive family for the intervening period of time.

The same would be true here. Thus, Mr. K. could win here and lose below. The court below could find that despite any rights belonging to Mr. K., detriment to the child upon removal would be too severe to tolerate. See Bennett v. Jeffreys. 40 N.Y. 2d 543, 356 NE 2d 277 (1976); J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979).

No decision of this Court should permit harm to Baby Girl S., an innocent child in the midst of legal turmoil.

CONCLUSION

We ask this Court to listen carefully to the voices of the young unwed mothers whose interests have not heretofor been represented here and to affirm the decisions of the courts below.

P.K. writes:

> Please before a decision is made put yourself in our place. Also, if you have [a] daughter or younger sister what place would this put her in? Thank you and think hard about this before deciding.

On a more philosophical level, SS. writes:

> We are a very strange society. In our very efforts to promote "freedom" and "openness" and "equality" we may find ourselves harming the very structures and institutions, in this case family and adoption, which we seek to protect and strengthen.

Respectfully submitted,

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